

## WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. H.E., 2018 ONCA 879

DATE: 20181102

DOCKET: C64583

MacPherson, Miller and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

H.E.

Respondent

Christine Bartlett-Hughes, for the appellant

Anne-Marie McElroy, for the respondent

Heard: November 1, 2018

On appeal from the acquittal entered on October 17, 2017 by Justice Robert J. Smith of the Superior Court of Justice, sitting without a jury, with reasons reported at 2017 ONSC 4277.

REASONS FOR DECISION

[1] The Crown is appealing H.E.'s acquittal on the charge of sexually assaulting the complainant, his wife. During the trial the complainant testified that in 2002 Mr. E. pulled her onto the couch, forcibly removed her clothing, and forced intercourse on her, despite that she asked him to stop at least three times. Mr. E. testified and denied that he had any sexual contact with her on the occasion in question.

[2] After accepting the complainant's testimony that both she and Mr. E. believed that, as his wife, she did not have the right to refuse to have sex with him, the trial judge explained the acquittal by expressing a reasonable doubt about whether Mr. E. had the required *mens rea* for the offence. In elaboration, he cited the complainant's testimony that she had "lived in Canada since 1989, did not make any complaint until the parties had a dispute involving access [in circumstances] where the complainant continued to have sex with the accused from the time of the incident in 2002 until January 1, 2013 a period of approximately 11 years".

[3] Mr. E. concedes that the trial judge committed reversible errors in this reasoning. He acknowledges that to the extent the trial judge based his acquittal on Mr. E.'s and the complainant's shared belief that the complainant could not refuse to have sex with him, that belief would be a mistake of law that cannot form the foundation for an honest but mistaken belief in consent defence. He is correct. To avoid conviction based on an honest but mistaken belief in consent, the accused must believe in a state of facts that amount to consent according to law:

*Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at pp. 134, 147-148; *R. v. Barton*, 2017 ABCA 216, 386 C.R.R. (2d) 104, at paras. 245, 254, leave to appeal to S.C.C. granted, [2017] S.C.C.A. No. 387, appeal heard and reserved October 11, 2018. A complainant's belief that she must submit does not amount to the "voluntary agreement" required by s. 273.1(1).

[4] Mr. E. also agrees that there was no air of reality to the honest but mistaken belief in consent defence because the diametrically opposed versions of events he and the complainant provided cannot be spliced together to give rise to a realistic prospect that Mr. E. could have mistakenly believed that the complainant was consenting: *R. v. Davis*, [1999] 3 S.C.R. 759, at para. 85. This was a credibility case in which Mr. E. did not raise the honest but mistaken belief in consent defence during the trial and it should not have been considered.

[5] Mr. E. further recognizes that the factors cited by the trial judge in explaining his reasonable doubt about Mr. E.'s *mens rea* logically have no bearing on Mr. E.'s state of mind. Leaving aside controversies about whether these factors were even appropriate for consideration, they relate either to the complainant's credibility or the *actus reus* element of her consent, but not to Mr. E.'s *mens rea*.

[6] The parties therefore agree that the appeal must be allowed and the verdict of acquittal set aside. The Crown has chosen not to ask this court to substitute a verdict of guilt. This is an appropriate concession because there were evidentiary

errors made by the trial judge to the detriment of Mr. E., including permitting the Crown to present evidence about other occasions when Mr. E. is alleged to have sexually assaulted the complainant without conducting a *voir dire* to determine the admissibility of this discreditable conduct evidence.

[7] We would therefore allow the appeal, set aside the acquittal, and order a new trial.

“J.C. MacPherson J.A.”

“B.W. Miller J.A.”

“David M. Paciocco J.A.”